REVIEWS AND NOTICES.

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THE SOCIAL PHILOSOPHY OF MR. JUSTICE BRANDEIS.*

Canadians, lawyers and laymen alike, find it difficult to appreciate the control which American courts, especially the Supreme Court of the United States, exercise over the social policy of the state and of the nation. Our courts have the comparatively simple constitutional task of plotting the line between federal and provincial jurisdiction; American courts have the additional burden of applying against the legislature prohibitions on legislative power, which an earlier day suspicious of government in general, deemed essential to the preservation of individual rights against invasion by the state. In particular the "due process clause" of the 14th Amendment—"no person shall be deprived of life, liberty or property without due process of law"—has made the federal Supreme Court the arbiter of social legislation in the states. Moreover such terms as "deprive," "property," "liberty," "due process" are so delightfully vague that the court in fact becomes a legislature when it attempts to give them meaning, and into them may be read widely different philosophical views of society and of law. In addition, the difficulty of amending the American Constitution, and the general view that it is a higher kind of law to which all subordinate law-making must conform have given rise to different and more elastic rules of interpretation than those applied to ordinary statutes. This situation has in fact brought about "judicial amendment" of the constitution to a much greater degree than has been the case with the British North America Act. Under these conditions the social ideas of a judge, particularly of the Supreme Court of the United States, becomes scarcely less important than his knowledge of law. Among modern judges of the Supreme Court none have done more to modernise the federal constitution and to bring it into line with modern social facts than Justices Holmes and Brandeis. Professor Mason's book is not a life but a study of the social philosophy of Mr. Justice Brandeis. It appears at an appropriate time; in the evening of a long and active life Mr. Justice Brandeis finds his social philosophy fulfilled in large measure in President Roosevelt's "New Deal."

Brandeis first became a national figure as an attorney for labour and other popular movements against "Big Business," and as an investigator and writer on social and economic problems. Indeed, so well recognised were his views that his nomination by President Wilson to the Supreme Court was the occasion for a long and bitter fight before confirmation by the Senate. And the judgment of his critics has been amply justified. On the Court Brandeis has frankly sought to reconcile the Constitution to his social views and has been a frequent dissenter in labour and other cases involving social policy.

* *Brandeis: Lawyer and Judge in the Modern State*, by Alpheus Thomas Mason. Princeton University Press. 1933. pp. 203. $2.00.

Yet Brandeis is no radical. His view of the Constitution differs little from that of Marshall and certain other distinguished members that "the logic of words must yield to the logic of realities." His contribution is simply his greater awareness than most of his colleagues of social realities. He approaches social problems by the newer methods of social science rather than alone through the ancient canons of law. His knowledge of economics, of sociology, of business organization, of finance, and of the method of statistics, enables him to see and understand facts which most of his fellow-judges completely overlook. To him law must be interpreted and applied in the light of these facts. Law, he believes, must be an instrument of social policy, not an obstacle to social progress.

While Brandeis is essentially a social scientist rather than a philosopher, his views of society are those of a liberal aware of the problems and tendencies of the industrial age. He is convinced of the moral value of private property, of private initiative, and of democracy, and in the social desirability of individual liberty. But liberty and democracy are alike challenged by the growth of giant corporations, by the irresponsibility of corporate ownership, and by the growth of enormous private fortunes. The degree of equality between man and man, essential to the preservation alike of liberty and democracy, can only be assured by government intervention and law.

Justice Brandeis, there is every reason to believe, will rank as one of the great judges of American history. Professor Mason's work is worthy of the subject. It is a vivid, scholarly study, marked by sympathetic insight both into the mind of Mr. Justice Brandeis and into the social conditions of our time. It should be widely read in Canada, by lawyers and laymen alike, for the intrinsic merits both of the subject and of the book.

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The Constitutional Structure of the British Commonwealth.*

The literature surrounding that unique constitutional document known as the Statute of Westminster 1931 is steadily growing in bulk, and Mr. Wheare's little volume is a praiseworthy contribution to it. He is to be commended in his choice of approaching his subject from the point of view of the student of constitutional history rather than from that of the lawyer. To submit any modern constitutional settlement that has been made the subject of legislation to the strict rules of judicial interpretation applying to ordinary statutes is to subordinate the welfare of the State to the traditions of that sheer legalism which hampered the operation of law as a social instrument in the nineteenth century. The French outcry of a hundred years ago, *la légalité nous tue,* might properly have found an echo in the British world. To review the earlier cases interpretative of the British North America Act as a statute *et praeterea nihil* is to realize that there have been occasions when resort to the technics of statutory construction has defeated the plain intention of the framers of that organic instrument as revealed in parliamentary debates and conferences and indeed in the political history of the period

**The Statute of Westminster 1931.* By K. C. Wheare. Oxford: at the Clarendon Press. Toronto: The Oxford University Press. Pp. VI—128. Price $1.75.

which gave it birth. Fortunately in the last few years decisions of the Judicial Committee of the Privy Council in such cases as *Edwards* v. *Attorney-General of Canada*, [1930] A.C. 124, and *The Aviation Case*, [1932] A.C. 54 indulge the hope that we shall hear less talk among lawyers of a rigid construction of a "rigid constitution" (as if any constitution could be rigid at any moment to the detriment of national welfare, unless it were one of the type that Jefferson had in his mind when he said that its life should be prescribed by nineteen years!), and that the Courts hereafter in matters of doubt will seek interpretative aid from the aims and intention of the constitution builders as such appear in some authentic record. Nor will the Judges in all likelihood hesitate to say that the strictly legal element of the Canadian Constitution may not be modified by usages and conventions that have grown up since 1867. To do that would be to follow the present usage of the Judicial Committee which, in Professor Keith's phrase, "mingles political wisdom with legal interpretation." Mr. Wheare himself rejects the appositeness of the term "rigid" as applied to written constitutions. In a note to p. 12 he refers to Lord Bryce's *Studies in History and Jurisprudence* and says: "Bryce's own classification of constitutions into 'rigid' and 'flexible' is far from satisfactory;" and in the text of the same page he observes: "If by 'constitution' is meant the body of rules which regulates the ends for which and the organs through which governmental power is exercised, then it is clear that in most countries both 'written' and 'unwritten' elements go to make up that body of rules. There may exist in some countries a single written document or a collection of written documents containing a considerable portion of this body of rules, and capable of alteration only by some special or complicated process. It may be called a fundamental law. But it does not necessarily comprise all that part which may be described as 'written,' and it does not usually comprise all the constitution itself."

Turning our attention particularly now to the organic document which forms the subject of Mr. Wheare's book we find that he treats it simply as a part of the constitutional structure of the British Commonwealth and is, therefore, not to be regarded as an isolated document in constitutional law. As such it must be studied "in the light of an understanding of the elements which compose that structure . . . The precise significance of the Statute and its possible influence cannot be understood except in relation to the peculiar nature of the whole structure of which it forms a part." More than that the Statute "is an event in British Constitutional history. It stands at the close of a period in the history of the British Empire which has witnessed the gradual emergence of those overseas possessions of the Crown which now comprise the British Commonwealth of Nations from a state of imperial governance to full responsible self-government." Hence it must be viewed "in the light of the history which made it and which is embodied in it." Again the author does not regard the Statute as providing a written constitution for the British Commonwealth. If it attempted to do that it would justify the view of some critics when it was under discussion as a Bill that it is impossible "to translate into strict legal theory a well understood body of constitutional practice which is essentially untranslatable." Furthermore, if the Statute sought to define the "constitutional usage governing the relations of the King and his ministers in a Dominion, or the precise mechanism through which the diplomatic unity of the Commonwealth was to be preserved and exercised . . . then it might justly be criticized as putting into an

iron framework the essentially flexible and ever-growing and changing conventions of the Commonwealth Constitution."

So speaks Mr. Wheare, and we think with judgment and good sense in so weighty a matter. His views make it abundantly clear that if and when judicial interpretation of the Statute of Westminster becomes necessary the Courts should not seek to divine its purpose through the strict medium of nineteenth century canons of construction, but proceed to interpret it in the light of the historical evolution of the English type of government as well as the imperial exigencies that were vocal at the time of its enactment.

It may be said that Mr. Wheare's outlook for the future of the Statute corresponds intimately with that of a well-known Canadian writer on constitutional subjects, Professor W. P. M. Kennedy, as expressed in a thoughtful and informative article in *The Juridical Review* for December last. Professor Kennedy there says that in looking to the future he is fortified by the past, and he adds: "Whatever that future may contain and whatever judicial interpretations may be put upon the Statute, I have a faith drawn from the historical evolution, that, if we move on without passion, without narrow legalism, without excess of political dogma, we shall not mortgage the benefits which the British Commonwealth of Nations may confer on itself and on the world."

Before concluding our notice of Mr. Wheare's book we would especially commend his survey of the process of building up the constitutional structure of the Commonwealth as history unfolds it. To furnish even the most tenuous sketch of that process within the limits of some fifty 12 mo. pages would tax the skill of most adventurers upon such a task; but Mr. Wheare has succeeded in producing more than an impressionist picture of the chief events in the foreward movement of colonial autonomy during the last hundred years. Where detail is demanded in the interest of clear understanding, detail is supplied. Here and there some fact more or less extraneous to his immediate purpose, but yet expository of it, is introduced into the sketch with broad and rapid strokes. A good example of his technique in this respect is furnished on page 22 where he distinguishes the attitude of the Americans in the last quarter of the eighteenth century from that of the Canadians in the second quarter of the nineteenth, as regards the unlimited legal sovereignty of the Imperial Parliament. This question, although now a purely academic one for them, is still being debated by American writers; but Canadians must realize that the Statute of Westminster leaves that sovereignty untouched.

As we have pointed out Mr. Wheare treats the Statute as a part only—perhaps the chief corner-stone—of the constitutional structure of the British Commonwealth. Would he be inclined to treat a Commonwealth Court for the settlement of disputes arising under the Statute of Westminster, the erection of which is suggested by Professor Kennedy in the article referred to, as the coping-stone of that structure? We wonder.

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Courtney Stanhope Kenny. By H. D. Hazeltine. London: Humphrey Milford. 1933. Price 3s. 6d. net.

This is an interesting sketch of the life of a great teacher of law who succeeded the famous Frederick W. Maitland as Downing Professor of Law in the University of Cambridge. Professor Kenny was well known to law students in Canada through the medium of his excellent "Outlines of the Criminal Law." Professor Hazeltine ascribes to him the standing of "the foremost English jurist of his time," and he quotes the following tribute to the deceased scholar by Professor Winfield, who was first a pupil and later a colleague of Kenny's: "His lectures flame like a beacon in the memories of those who have attended them and have been the altar at which younger instructors have sought to kindle their own more humble torches." Kenny was at one time a member of Parliament for the Barnsley Division of Yorkshire, and in that capacity his abilities were devoted to reforms in criminal law, education and charities. Professor Hazeltine has printed as an appendix to his monograph a list of some of Kenny's leading articles as they appeared in the reviews during his lifetime, and by so doing has conferred a favour upon all those who value Kenny's views and opinions as a jurist.

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Moneylending in Great Britain. By Dorothy Johnson Orchard and Geoffrey May. New York: Russell Sage Foundation, 1933. Price $2.00.

In a foreword to this work it is explained that it is a part of a series of publications embodying a general survey of small loan business prepared for the Russell Sage Foundation under the direction of Dr. Louis N. Robinson. The aim of the present work is to reveal the chronological development of British moneylending, and to show how the enterprise of moneylending has adapted itself to changing legal economic and social environments in Great Britain. It excludes from consideration bankers' loans for purposes of commerce and production, and small lending by pawn-brokers secured by tangible pledges. It is pointed out that the absence of usury laws in Great Britain dispenses with the distinctive treatment of a special class of borrowers. Where the prospective borrower cannot furnish security to the satisfaction of a bank he must resort to a private lender or pawn-broker for a loan at a higher rate of interest than the commercial bank rate. Chapter V of the book explains the working of the British Moneylenders Act of 1927 in dealing with the abuses that the Act of 1900 had failed to correct. The purposes of the more recent legislation are (1) to set up an efficient control by the State of moneylenders; (2) specific protection of borrowers; (3) limitation of interest rates; and (4) protection of third persons from loss as the consequence of a moneylending transaction. The Act of 1927 suppresses misleading advertising by moneylenders, and prohibits lenders from employing agents or canvassers, and when an agent or canvasser on his own initiative introduces a borrower to a lender he cannot receive remuneration for his services.